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Attorney for Plaintiff

6  
 7 IN THE UNITED STATES DISTRICT COURT FOR THE  
 8 NORTHERN DISTRICT OF CALIFORNIA

9  
 10 AF HOLDINGS LLC,

11 Plaintiff,

v.

12 JOHN DOE AND JOHN BOTSON,

13 Defendants.  
 14

No. 5:12-cv-02048-EJD

**PLAINTIFF'S RESPONSE TO  
 DEFENDANT BOTSON'S NOTICE OF  
 SUPPLEMENTAL AUTHORITY**

15  
 16 Defendant John Botson filed a notice of supplemental authority in support of his motion to  
 17 dismiss. (ECF No. 20.) Defendant Botson attached the decision in *AF Holdings v. John Doe & Josh*  
 18 *Hatfield*, 12-cv-02049 (N.D. Cal. September 4, 2012) to his notice. (ECF No. 20-1.) Defendant  
 19 Botson argues that the attached decision involves a “functionally identical claim of negligence  
 20 against an ISP account-holder.” (ECF No. 20.)

21 Defendant’s characterization of Plaintiff’s claim is, *per se*, false. Negligence claims are  
 22 highly fact-intensive. *Thomas v. Newton Intern. Enterprises*, 42 F.3d 1266, 1271 (9th Cir. 1994) (“In  
 23 many cases, this fact-intensive question will be inappropriate to decide on summary judgment and  
 24 must be left for the jury.”) (quoting *Kirsch v. Plovodba*, 971 F.2d 1026, 1030 (3rd Cir. 1992). Simply  
 25 because the general factual background involves digital piracy does not mean that the specific  
 26 circumstances of a given claim is functionally identical.

27 Indeed, federal courts throughout California have recognized that the negligence claims  
 28 asserted by Plaintiff in its first amended complaint could survive a motion to dismiss. *See e.g.*,

1 *Liberty Media Holdings, LLC v. Felix Latimore, et al.*, No. 11-cv-00040 (S.D. Cal. July 11, 2011),  
2 ECF No. 9 (recommending the granting of a motion for default judgment against a Defendant  
3 accused of negligence); *AF Holdings LLC v. John Doe*, No. 12-1519 (S.D. Cal. July 12, 2012), ECF  
4 No. 4 at 6 (“Accordingly, Plaintiff’s negligence cause of action could withstand a motion to  
5 dismiss.”).

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7 Respectfully Submitted,

8 PRENDA LAW INC.

9 **DATED: September 13, 2012**

10 By: /s/ Brett L. Gibbs

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on September 13, 2012, all individuals of record who are deemed to have consented to electronic service are being served a true and correct copy of the foregoing document using the Court's ECF system.

/s/ Brett L. Gibbs, Esq.  
Brett L. Gibbs, Esq.